

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-1439

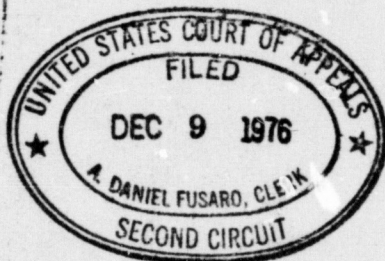
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
ALBERT DUKE,
Defendant-Appellant.

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Docket No. 76-1439

BRIEF FOR APPELLANT
PURSUANT TO
ANDERS v. CALIFORNIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether this case presents any non-frivolous issues to
be raised for this Court's consideration on appeal.

STATEMENT PURSUANT TO RULE 28(a) (3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable Edward Weinfeld) rendered on September 16, 1976, after a trial before a jury, convicting appellant Albert Duke of transporting in interstate commerce stolen securities valued at more than \$5,000, knowing them to have been stolen (Count Two), and conspiracy to do the same (Count One). Appellant Duke was sentenced to a term of imprisonment for seven years on Count Two and five years on Count One, the terms to be served concurrently.

When retained trial counsel was relieved, this Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant, with Debra Bryant, was indicted for conspiracy to transport in interstate commerce stolen securities of a value of \$5,000 or more and with that substantive crime.¹ Prior to appellant's trial, Miss Bryant pleaded guilty, and testified as a Government witness at appellant's trial.

¹The indictment is B to the separate appendix to appellant's brief.

At trial, Miss Bryant testified that she worked as a clerk (64²) for Pershing & Company (63). Pershing, acting for other brokers, executed and cleared the transfer of securities, received and delivered securities, acted as custodian for securities, and distributed dividends (24). Miss Bryant handled the Transfer Agent Depository ("TAD"), which sent the stock to the transfer agent, who sent it to different banks (64).

Bryant testified that during August 1975 (64)³ she met appellant, who asked her if she'd like to make some money (65). Appellant asked how he could get in touch with Bryant, and she gave him her mother's telephone number (65).

The two met about a week later. Appellant asked Bryant to get him some stock, a tax stamp, and a waiver stamp. Appellant told Bryant she would get \$10,000 or \$25,000 out of it, depending on the amount of stock she was able to get (67). According to Bryant, appellant said he planned to give the stock to some people on Long Island or out of town (68), and appellant gave Bryant the telephone number 283-3939, at which he could be reached (68).⁴

²Numerals in parentheses refer to pages of the transcript of the trial.

³Bryant later testified that this meeting occurred in mid-September (111).

⁴Telephone records showed that this was the number at Shabazz Enterprises and that the telephone was disconnected on December 8, 1975 (GX 30-A).

Bryant and appellant discussed various ways of removing the certificates from the Pershing office (69), and it was decided that Bryant would devise the means (69). Bryant then testified that she decided not to steal the bonds (71) and at that point appellant told her if she changed her mind to call 283-3939 and say "D for D Bingo" (71).

That day, Bryant bought a pair of knee length stockings, into which she planned to put the securities; later that night, appellant told Bryant that she had to get the securities the next day because the people on Long Island, who had come from Chicago (72), were getting impatient (71).

The next day Bryant took some securities of Vetco Off-shore, Xerox, Philadelphia Electric, and Royal Dutch Petroleum (72). She stuffed the securities in her stockings, went to the ladies' room, smoothed them out, and then met appellant, who was with a friend in a nearby subway station, where she gave him the securities (73).

According to Bryant, appellant did not pay her but, on the promise that he would give her \$25,000, she agreed to steal more securities (74-75).

The next day Bryant took securities of Gulf Oil, General Motors, and Texaco which had been left on her desk,⁵ put them in her stockings, and again met appellant, who was with the

⁵ These were securities sent to TAD for transfer when Pershing was unable to transfer them.

same person (76). In response to Bryant's request for her money, appellant told her she'd be rich by the end of the week (76), but at that point, gave her only \$100 (76).

Bryant never saw appellant again, although she tried many times to reach him at the number he had given her (78). Others she spoke to told her that she would get her money (79). On one occasion, a man named Sham Sheddin told her that if she went to the authorities and revealed what had happened, she would go to jail for fraud (80).

During January 1976, this same man, Sham Sheddin, called Bryant to ask her to get some large Pershing envelopes and delivery bills (81). She could not get the envelopes, but did obtain the bills for him. On delivery, Sheddin paid Bryant \$30, rather than the \$50 she asked for (82). She also told Sheddin that she had been questioned by the FBI (81).⁶

Daniel Guarnieri testified that he was in charge at Pershing (24) of the internal auditing required by the Securities and Exchange Commission and the New York Stock Exchange (25). He testified that records are maintained of all in-coming and out-going securities (25). In an audit, all securities are counted and then compared to a counter printout of the securities that should be at the company (26-27). If there is a difference between the printout and the physical count, it is

⁶In March 1976 Miss Bryant told the FBI about what had occurred (116).

posted on a ledger sheet (27).⁷ In the October 17 audit, there were unresolved differences in five types of securities (27-28). The securities were Bannister Continental; 500 shares of International Nickel (GX 2); 100 shares of Philadelphia Electric (GX 5); 100 shares of Royal Dutch Petroleum (GX 1), and 300 shares of Vetco Offshore (GX 3, 4). Stop orders were placed on all these securities (27-28).

One week after the audit, Mr. Guarnieri prepared a report reflecting these unresolved differences (GX 11 at 46). The document showed the prices of the stocks per share on the date of the report, totaling a value of \$64,000 (48).

Mark Bredin testified that he was a registered representative of Merrill, Lynch, Pierce, Fenner & Smith in Philadelphia. On January 2, 1976, a man named Alphonse Johnson appeared at Bredin's office (120) wanting to transfer securities from an account with Pershing & Company in New York to Merrill, Lynch in Philadelphia (121), and filled out a new account card (123). Johnson said that he had securities of Royal Dutch Petroleum, Vetco Offshore, General Motors, and International Nickel (121).

Johnson said that he did not want the securities transferred directly from Pershing to Merrill, Lynch because it took too long (122) and that he would arrange for the transfer (123).

⁷ There may be securities which have entered the office and not been sent out (inventory), but not the opposite (30).

On January 5, 1976, Bredin received a collect telephone call from a woman who said she was Johnson's secretary and stated that the securities would be mailed in one week (124).⁸ On January 16, 1976, Bredin got a second call from someone claiming to be Johnson's secretary, stating that the securities would be mailed that day (125). Telephone company records showed that a telephone call was made on January 16, 1976, to (215) 864-5000, the Merrill, Lynch number (132), from a telephone with the number 829-3008. That telephone was registered in the name of D. Sanchez at 2031 Story Avenue (GX 30-F, G).⁹ According to Damon Daylor, the agent who arrested appellant, appellant had said that Desiree Sanchez at 2031 Story Avenue was his common law wife (191).

On January 19, 1976, Johnson called and asked if the securities had arrived. Although they had not arrived at the moment of the call, they arrived ten minutes later (126). The envelope was addressed from Johnson to Bredin, and included stock certificates and a hand-written delivery slip from Pershing & Company (GX 12) (48, 128, 175). Typed on the slip was the name Alphonso Johnson, 1560 Grand Concourse, Bronx, New York, with the securities and certificate numbers listed (49).

⁸This testimony was admitted subject to connection and to a motion to strike as the statement of an unindicted co-conspirator (124).

⁹Counsel objected to the admission of these records as being without foundation (193).

The envelope was received by John Maialetti, operations manager for Merrill, Lynch in Philadelphia (173). The stock was valued at \$67,000 (175) "as of the closing of the market on January 19, 1976."¹⁰

On January 20, 1976, Johnson called Bredin three times (128). In the second call, Johnson asked Bredin to sell the 500 shares of Royal Dutch Petroleum at \$42 a share, and Bredin accepted that order (129).

After a conversation with the manager of Merrill, Lynch, Bredin decided that he could not fulfill the sell order, and tried to reach Johnson at the Philadelphia telephone number Johnson had given (732-3738), but found that it was disconnected (130).

When Johnson called back later, Bredin said he could not fulfill the sell order. When Bredin reported that the Philadelphia number had been disconnected, Johnson left a New York number where a message could be left ((212) 926-9601) (131).¹¹

Samuel W. Hawley, a registered stock broker for Carreau, Smith of Connecticut, testified that on January 5, 1976, Alphonso Johnson sought to establish an account with that firm.

¹⁰ According to Maialetti, several of the certificates were not negotiable because they lacked the requisite endorsements (178). However, Maialetti testified that this did not affect the market value of the certificates (183).

¹¹ Telephone records show that this number was listed in the name of Shabazz Enterprises and was disconnected on January 13, 1976 (GX 30-D) (190, 193).

Hawley gave Johnson a transfer form. Johnson said that he had several stocks, including Royal Dutch Petroleum. Hawley also believed that Johnson mentioned International Nickel and General Motors (155).

John Fortuna, a stock broker with Hoppin Watson of Bridge-Port, Connecticut, testified that during the first week of January 1976, Alphonso Johnson sought to transfer his account from Merrill, Lynch in Philadelphia (159). Johnson mentioned having Royal Dutch Petroleum and General Motors stocks (162).

Wesley Johnson, manager of the Port Washington post office branch, testified that on January 16, 1976, at 4:30 p.m., there was a dispute as to the fee on a registered parcel (167). Johnson identified as the parcel the envelope Bredin received at Merrill, Lynch in Philadelphia (see GX 21 at 127) (169). The envelope was insured for \$50,000, on which the Government's liability was limited to \$10,000 if the envelope were lost (171).

Neither Johnson, Fortuna, Hawley, nor Bredin made an identification of appellant as Alphonso Johnson.

Fingerprints were taken of appellant Duke at the time of his arrest on March 18, 1976 (GX 28) (188). Larry Harper, an FBI fingerprint expert, testified that he compared those prints with latent prints on the account card from Chemical Bank in the name of Alphonso Johnson (GX 13), a check payable to and endorsed by Alphonso Johnson (GX 18),¹² and the new account

¹² This check was introduced as GX 18, and was a Chemical Bank check for \$50 paid to Johnson (151).

card filed at Hoppin, Wilson, and signed by Alphonso Johnson (GX 25) (196-198). Harper "found that one latent fingerprint developed on each of these items, 13, 18, and 25, to have been made by one of the fingerprints which appears on [Exhibit 28]" (197).

The Government also introduced telephone company toll charge records showing that on January 14, 1976, five telephone calls were made from the Philadelphia telephone number given by Johnson to Breden at Merrill, Lynch, to a New York City telephone number, (212) 378-5965 (144-148). At the time of his arrest on March 18, 1976, appellant gave the FBI that New York City number as his (188). Over defense objection, the district judge admitted this evidence to show the connection between the Philadelphia number and the New York number, and between Johnson and appellant (150). The judge erroneously stated that the Philadelphia number belonged to appellant's wife.

At the conclusion of the charge,¹³ defense counsel objected to the court's failure to tell the jurors that the co-conspirator, Bryant, had to know that the securities were to be transported in interstate commerce. Judge Weinfeld rejected the objection (302).

After deliberations, the jury convicted appellant.

¹³The complete charge is C to the separate appendix to appellant's brief.

POSSIBLE ISSUES ON APPEAL

I. Admissibility of the telephone company records

Defense counsel objected to the introduction into evidence of the New York and Philadelphia telephone company records, on the grounds that the records did not reveal the participants in or contents of the confersations. However, the records were introduced not as direct evidence of the crime, but to show that Alphonse Johnson's use of telephones that had some connection to Albert Duke was not merely coincidence, and was therefore circumstantial evidence of the likelihood that Johnson was really Duke.

Even though Judge Weinfeld erroneously stated that the Philadelphia number given by appellant to Breden at Merrill, Lynch was the number of appellant's wife, D. Sanchez, the evidence was still relevant, because calls were made from that telephone number to a telephone number appellant later gave as his.

II. Credibility of witnesses

The three factual questions raised in the case were whether the bonds were stolen by appellant, whether the man who called himself Johnson either mailed them or caused them to be mailed, and whether Duke and Johnson were the same person. All these issues depended upon the jurors' evaluation

of the credibility of the Government's witnesses. The facts of this case raise no issue of credibility as a matter of law; accordingly, the jurors' decision is not reversible.

III. The objection to the charge

In his charge on conspiracy, Judge Weinfeld instructed the jurors as follows:

It is not necessary that the conspirators have actually intended that the stolen securities be transported from one state to another. It is sufficient if the proof shows that there was an agreement to participate in a scheme which by its nature involved interstate transportation or reasonably contemplated the use of interstate transportation to effectuate the conspiratorial purpose and that such interstate transportation actually occurred.

(280-281).

Counsel objected to the failure of the charge to inform the jury that Bryant, as the co-conspirator and aider and abettor, had to be aware that the stolen securities would be transferred in interstate commerce. Judge Weinfeld rejected that objection. Here, the jury could find that appellant told Bryant that his contacts were in Long Island, but were returning to Chicago and therefore needed the securities quickly. Thus, it could be inferred that the participants were aware of the interstate nature of the conspiracy.

CONCLUSION

For the foregoing reasons, there are no non-frivolous issues in this case to be presented for consideration by this Court; accordingly, an order should be entered relieving The Legal Aid Society, Federal Defender Services Unit, as counsel for appellant Albert Duke.

Respectfully submitted,

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PHYLIS SKLOOT BAMBERGER,
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CERTIFICATE OF SERVICE

December 9 , 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York ~~and to appellant Albert Duce.~~

By: S. K. Bales

